

Statements by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, November 21, 2018

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB
 - A. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.189)
 - The United States provided a status report in this dispute on November 8, 2018, in accordance with Article 21.6 of the DSU.
 - The United States has addressed the DSB’s recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.
 - With respect to the recommendations and rulings of the DSB that have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT:
STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.164)

- The United States provided a status report in this dispute on November 8, 2018, in accordance with Article 21.6 of the DSU.
- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

Second Intervention

- As we have noted at prior meetings of the DSB, by intervening under this item, China attempts to give the appearance of concern for intellectual property rights.
- As we noted at the last meeting of the DSB, China's intervention is ironic, given agenda item 5, the second request for establishment of a panel by the United States in the dispute, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*. We will address China's purported interest in protecting intellectual property rights under that item.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.127)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- The United States remains concerned with the EU’s measures affecting the approval of biotech products. Delays persist and affect dozens of applications that have been awaiting approval for months or years, or that have already received approval.
- Even when the EU finally approves a biotech product, EU member States continue to impose bans on the supposedly approved product. As we have highlighted at several prior meetings, the EU maintains legislation that permits EU member States to “opt out” of certain approvals, even where the European Food Safety Authority (“EFSA”) has concluded that the product is safe. Of note, at least seventeen EU member States, as well as certain regions within EU member States, have submitted requests to opt out of EU approvals.
- We further note a recent public statement issued by the European Union’s Group of Chief Scientific Advisors on November 13, 2018, in response to the July 25, 2018 European Court of Justice (“ECJ”) ruling that addresses the forms of mutagenesis that qualify for the exemption contained in EU Directive 2001/18/EC. The Directive was a central issue in dispute in these WTO proceedings, and concerns the Deliberate Release into the Environment of Genetically Modified Organisms, or GMOs. The EU Group of Chief Scientific Advisor’s statement recognizes that, “in view of the Court’s ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose.” The United States urges the European Union to finally act in a manner that will bring into compliance the measures at issue in this dispute.
- The United States furthermore urges the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, are based on scientific principles, and that decisions are taken without undue delay.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS464/17/ADD.11)

- The United States provided a status report in this dispute on November 8, 2018, in accordance with Article 21.6 of the DSU.
- On December 15, 2017, the United States Trade Representative requested that the U.S. Department of Commerce make a determination under section 129 of the *Uruguay Round Agreements Act* to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On December 18, the Department of Commerce initiated a proceeding to make such determination. Following initiation, Commerce issued initial and supplemental questionnaires seeking additional information.
- On April 4, 2018, Commerce issued a preliminary determination revising certain aspects of its original determination. Following issuance of the preliminary determination, Commerce provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination and rebuttal comments. Commerce reviewed those comments and rebuttal comments and took them into account for purposes of preparing the final determination.
- On June 4, 2018, Commerce issued a final determination, in which Commerce revised certain aspects of its original determination. Specifically, Commerce revised the analysis underlying the CVD determination, as it pertains to certain tax credit programs, in accordance with findings adopted by the DSB.
- The United States continues to consult with interested parties on options to address the recommendations of the DSB relating to antidumping measures challenged in this dispute.

Second Intervention

- The United States takes note of Canada's statement and will convey it to capital.
- To be clear, however, it is incorrect to suggest that the United States has taken no action in relation to the antidumping findings. As we have noted today, the United States

continues to consult with interested parties on options to address the recommendations of the DSB. That internal process is ongoing.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI DUMPING PROCEEDINGS INVOLVING CHINA: STATUS REPORT BY THE UNITED STATES (WT/DS471/17/ADD.3)

- The United States provided a status report in this dispute on November 8, 2018, in accordance with Article 21.6 of the DSU.
- As explained in that report, the United States continues to consult with interested parties on options to address the recommendations of the DSB.

Second Intervention

- The United States takes note of China's statement and will convey it to capital.
- The United States is willing to discuss this matter with China on a bilateral basis.
- To be clear, however, it is incorrect to suggest that the United States has taken no action. As we have reported to the DSB, the United States continues to consult with interested parties on options to address the recommendations of the DSB. That internal process is ongoing.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

H. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS488/12/ADD.2)

- The United States provided a status report in this dispute on November 8, 2018, in accordance with Article 21.6 of the DSU.
- As explained in that report, the United States continues to consult with interested parties on options to address the recommendations of the DSB.

2. UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB’s recommendations and rulings in these disputes.
- We recall, furthermore, that the EU has acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 10 years ago.
- With respect to the EU’s request for status reports in this matter, as we have already explained at previous DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented the DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.
- The practice of Members confirms this widespread understanding of Article 21.6 as we see no status report submitted by any Member in any dispute this month, or for previous meetings, where the responding Member has claimed compliance and the complaining Member disagrees.
- The EU explained last month that, in its view, the issue of compliance “remains unresolved for the purposes of Article 21.6.” Under such a standard, we would expect the EU to provide status reports in any dispute where there is a disagreement between the parties on the EU’s compliance, including the *EU – Large Civil Aircraft* dispute. Given its failure to provide a status report in that dispute again this month, we fail to see how the EU’s behavior is consistent with the alleged systemic view it has been espousing under this item for more than 10 years.
- As the EU is aware, the United States has announced in this dispute that it has implemented the DSB’s recommendations and rulings. If the EU disagrees, there would simply appear to be a disagreement between the parties to the dispute about the situation of compliance.

3. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENT BY THE UNITED STATES

- The United States notes that once again the European Union has not provided Members with a status report concerning the dispute *EU – Large Civil Aircraft* (DS316).
- The United States has raised this same issue at recent past DSB meetings, where the EU similarly chose not to provide a status report.
- As we have noted at several recent DSB meetings, the EU has argued that Article 21.6 of the DSU requires that “the issue of implementation shall remain on the DSB’s agenda until the issue is resolved.” And the EU has argued that where the EU does not agree with another Member’s “assertion that it has implemented the DSB ruling,” “the issue remains unresolved for the purposes of Article 21.6 DSU.”
- This stated EU position simply contradicts the EU’s actions in this dispute. The EU has admitted that there remains a disagreement as to whether the EU has complied in this dispute.
- Under the EU’s own view, therefore, the EU should be providing a status report. Yet it has failed to do so.
- The only difference that we can see is that, now that the EU is a *responding* party, the EU is choosing to contradict the reading of DSU Article 21.6 it has long erroneously promoted.
- The EU’s purported rationale is that it need not provide a status report because it is pursuing a second compliance panel under Article 21.5 of the DSU. But as the United States has explained at past DSB meetings, there is nothing in Article 21.6 of the DSU to support this position.
- In short, the conduct of every Member when acting as a responding party, including the EU, shows that WTO Members understand that a responding party has no obligation under DSU Article 21.6 to continue supplying status reports once that Member announces that it has implemented the DSB’s recommendations.
- As the EU allegedly disagrees with this position, it should for future meetings provide status reports. At this meeting, it should welcome the opportunity we are affording it to

update the DSB for the first time with any detail on its alleged implementation efforts.

5. CHINA – CERTAIN MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS542/8)

- As the United States noted at the October DSB meeting, China has implemented policies that consistently seek to disadvantage foreign companies for the benefit of Chinese industry.
- The policies deny foreign patent holders, including U.S. companies, basic patent rights to stop a Chinese entity from using the technology after a licensing contract ends.
- China also imposes mandatory adverse contract terms that discriminate against and are less favorable for imported foreign technology.
- These policies, reflected in Chinese legal instruments, are inconsistent with Articles 3 and 28 of the TRIPS Agreement because they fail to provide the intellectual property rights to which China committed when it acceded to the WTO.
- China has been engaging in industrial policy which has resulted in the discriminatory transfer of intellectual property and technology to the detriment of the United States and our workers and businesses. China's stated intention is to achieve global dominance in advanced technology.
- These unfair policies and practices affect all WTO Members, not just the United States. The United States has estimated that some of China's policies are causing \$50 billion in annual harm to the United States alone. The aggregate impact of China's policies to all WTO Members worldwide would be much higher.
- The best way for China to support fairness in the world trading system is to remedy the problems it has created. China should change its behavior: stop distorting markets, stop forcing companies to transfer technology, and create a level playing field that will give all countries a better chance to succeed.
- For the past several years, the United States has repeatedly raised concerns about China's policies relating to technology licensing that do not comport with China's WTO commitments. As these efforts have failed to resolve the dispute, the United States is now proceeding for the second time to request that the DSB establish a panel.
- Accordingly, the United States is requesting that the DSB establish a panel to examine the matter set out in our panel request with standard terms of reference.

6. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA (WT/DS544/8)

- China's second panel request in this dispute continues China's pattern of using the WTO dispute settlement system as an instrument to promote its non-market economic policies.
- These non-market policies are widely recognized by WTO Members as leading to massive excess capacity and distortions of world markets while damaging the interests of market-based economies and the businesses and workers who operate under these principles.
- In particular, China's policies have created and maintained excess capacity in the steel and aluminum sectors, and undermine the basic fairness of international trade.
- WTO Members already know that these sectors are suffering under conditions of excess capacity directly caused by China's non-market economic system. Driven by its industrial policy, China has created new plants and maintained existing production contrary to market signals. Under such conditions, it is impossible for businesses and workers in the United States, the European Union, Canada, Mexico, Norway, and other WTO Members, to earn a sufficient return in the market to remain viable over the longer term.
- As the report from the U.S. Secretary of Commerce notes, "[f]ree markets globally are adversely affected by substantial chronic global excess steel production led by China. While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined."¹
- Reports from the United States, however, are not the only ones that recognize the pervasive problems in the steel and aluminum sectors. The September 2018 Global Steel Forum Ministerial Report, agreed by 33 member countries, stated: "[E]xcess steelmaking capacity ... depresses prices, undermines profitability, generates damaging trade distortions, jeopardizes the very existence of companies and branches across the world,

¹ The Effect of Imports of Steel on the National Security, Jan. 11, 2018, p. 55.

creates regional imbalances, undermines the fight against environmental challenges and dangerously destabilizes world trading relations.”²

- And the OECD has reported that Chinese steel excess capacity is estimated at 300 million metric tons, dwarfing total U.S. production capacity.³ In the case of aluminum, since 2008, China has added 30 million metric tons in new capacity – that is more than the current combined capacity of the nine largest producers after China.
- China’s non-market policies also have led to global conditions in which core U.S. industries, which are vital to our national security, are not able to survive and invest for the future on market-based terms. This devastating effect on U.S. industries critical to our national defense could place the United States in a position where it is unable to meet national defense demands in a national emergency.
- The President of the United States has determined that, under these conditions, imports of steel and aluminum threaten to impair U.S. national security.
- The United States has given detailed explanations that the measures at issue are taken pursuant to Article XXI of the GATT 1994. In particular, we have explained the determination by the U.S. President that these measures are necessary to address the threat that imports of steel and aluminum articles pose to U.S. national security.
- Some Members have expressed concerns that invoking the national security exception in these circumstances would undermine the international trading system. This is erroneous, and completely backwards.
- Rather, what threatens the international trading system is that China is attempting to use the WTO dispute settlement system to prevent any action by any Member to address its unfair, trade-distorting policies.
- China’s choice to pursue dispute settlement against Members defending their legitimate interests would make WTO rules an instrument for China to protect its non-market behavior that is devastating the ability of WTO Members to defend their national security interests.

² Global Steel Forum Ministerial Report, Sept. 20, 2018, p. 1.

³ OECD, High Level Meeting: Excess Capacity and Structural Adjustment in the Steel Sector, April 2016, http://www.oecd.org/sti/ind/background%20document%20No%202_FINAL_Meeting/pdf.

- WTO rules do not make market-oriented WTO Members helpless in the face of blatant, unfair distortions that undermine their national security.
- GATT Article XXI reflects the common understanding, from the very beginning of the international trading system, that each WTO Member may judge for itself the actions necessary to protect its essential security interests.
- Were it otherwise, then the WTO and the international trading system would lose all credibility and support among our citizens.
- If China maintains its misguided request for a panel to make findings that the United States has not acted consistently with WTO rules in this dispute, there is no finding a panel could make other than to note that the United States has invoked Article XXI.
- China has requested that a single panel be established under Article 9.1 to examine various matters on the agenda of today's meeting. The United States does not agree.
- For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel.
- This is a decision taken by the DSB by consensus.
- Because the challenged actions were taken on the basis of U.S. national security interests, we continue to see no basis for this dispute. Therefore, we do not agree to establish a single panel under Article 9.1.

7. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION (WT/DS548/14)

- The United States is deeply disappointed that the European Union has submitted a second panel request in this dispute.
- As explained in our prior statement regarding this item, the EU knows as well as any WTO Member the extent and nature of the problems arising from China’s excessive steel and aluminum production, and the risks that excess capacity poses to the global economic system.
- The United States has made clear that it considers the Section 232 measures necessary for the protection of its essential security interests, given the key roles steel and aluminum play to our national defense.
- The U.S. measures are therefore justified under Article XXI of the GATT 1994 and not subject to review by a WTO panel.
- This has been the clear and unequivocal position of the United States for over 70 years, and has also been the position of the European Union and its member States. With good reason.
- The EU should well know the risks posed to the WTO dispute settlement system when a Member challenges measures taken for the protection of essential security interests.
- For example, in 1982, when certain European actions were before the GATT Council, the European Economic Community and its member States stated that Article XXI was a reflection of a Member’s “inherent rights.” They stressed that “the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights.”⁴

⁴ GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10.

- Some GATT Contracting Parties questioned the validity of the European Community's invocation of Article XXI,⁵ but the United States in the same meeting stood by the European Community and supported the European position.⁶
- The United States expressed unequivocally: "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise in the view of the United States, since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests."⁷ The position of the United States remains the same in 2018 as the United States expressed in 1982, 1949,⁸ and indeed during the negotiation of the GATT itself.⁹
- *Nothing* has changed in the text of Article XXI since 1982. But the *European* position has changed completely. The EU position taken today therefore lacks any principled rationale.
- Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised by the European Union. Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States. We therefore do not see any reason for this matter to proceed further.
- If the EU maintains its misguided request for a panel to make findings that the United States has not acted consistently with WTO rules in this dispute, there is no finding a panel could make other than to note that the United States has invoked Article XXI.
- Instead of litigating fruitlessly, the EU and its member States should reconsider and find common and effective means to advance our shared interests.
- The EU has requested that a single panel be established under Article 9.1 to examine various matters on the agenda of today's meeting. The United States does not agree.

⁵ GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 12 (statements of Argentina and Brazil).

⁶ See also GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 9-11 (statements of New Zealand, Norway, Canada, the United Kingdom, and Australia, also supporting the EEC position).

⁷ GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 8.

⁸ Contracting Parties, Summary Record of the Twenty-Second Meeting Held on 8 June 1949, GATT/CP.3/SR.22, p. 3.

⁹ See U.S. Answers Questions from the Panel and the Russian Federation, *Russia – Measures Concerning Traffic in Transit* (WT/DS512), paras. 1-15 (explaining negotiating history, including statements by U.S. delegate; available at <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.%28public%29.pdf>).

- For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel.
- This is a decision taken by the DSB by consensus.
- Because the challenged actions were taken on the basis of U.S. national security interests, we continue to see no basis for this dispute. Therefore, we do not agree to establish a single panel under Article 9.1.

8. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CANADA (WT/DS550/11)

- The United States is disappointed that Canada has requested establishment of a panel in this dispute for a second time.
- As we explained in our statement last month addressing Canada’s panel request, because the United States has invoked Article XXI of the GATT 1994, there is no basis for a panel to review Canada’s claims of WTO-inconsistency. The U.S. position is therefore completely consistent with the Canadian position – at least, as expressed by Canada when its own invocation of Article XXI was challenged back in 1982.¹⁰
- As there is no finding a panel could make other than to note that the United States has invoked Article XXI, we do not see any point to this request.
- The United States also recalls that Canadian and U.S. authorities have been engaging in constructive discussions towards resolving concerns surrounding these matters, and the United States is hopeful these discussions may be concluded satisfactorily.
- Canada has requested that a single panel be established under Article 9.1 to examine various matters on the agenda of today’s meeting. The United States does not agree.
- For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel.
- This is a decision taken by the DSB by consensus.
- Because the challenged actions were taken on the basis of U.S. national security interests, we continue to see no basis for this dispute. Therefore, we do not agree to establish a single panel under Article 9.1.

¹⁰ GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 10-11 (statement by Canada: “Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised. His delegation could not, therefore, accept the notion that there had been a violation of the General Agreement.”).

Second Intervention

- As stated, we see no basis for this dispute as there are no findings a panel can make on Canada's claims. Therefore, as there is nothing to examine, Article 9.3 does not apply.
- In response to Canada's reference to Article 9.3, and China's earlier reference to that article, that provision does not contain any reference to DSB action, and therefore does not authorize the DSB to make a decision on the matter of choosing panelists or on the harmonization of timetables.
- Therefore, the DSB need not and cannot consider this issue at all.

9. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY MEXICO (WT/DS551/11)

- The United States is disappointed that Mexico has requested establishment of a panel in this dispute a second time.
- As we explained in our statement last month addressing Mexico’s panel request, because the United States has invoked Article XXI of the GATT 1994, there is no basis for a panel to review Mexico’s claims of WTO-inconsistency. As there is no finding a panel could make other than to note that the United States has invoked Article XXI, we do not see any point to this request.
- The United States also recalls that Mexican and U.S. authorities have been engaging in constructive discussions towards resolving concerns surrounding these matters, and the United States is hopeful these discussions may be concluded satisfactorily.
- Mexico has requested that a single panel be established under Article 9.1 to examine various matters on the agenda of today’s meeting. The United States does not agree.
- For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel.
- This is a decision taken by the DSB by consensus.
- Because the challenged actions were taken on the basis of U.S. national security interests, we continue to see no basis for this dispute. Therefore, we do not agree to establish a single panel under Article 9.1.

10. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY NORWAY (WT/DS552/10)

- The United States is disappointed that Norway has submitted a second panel request in this dispute.
- As we explained in our statement last month addressing Norway's panel request, because the United States has invoked Article XXI of the GATT 1994, there is no basis for a panel to review Norway's claims of WTO-inconsistency. As there is no finding a panel could make other than to note that the United States has invoked Article XXI, we do not see any point to this request.
- If the WTO were to undertake to review a Member's invocation of Article XXI, and its assessment of its own essential security interests, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole.
- Infringing on a sovereign's right to determine, for itself, what is in its own essential security interests would run exactly contrary to the WTO reforms that are necessary in order for this organization to maintain any relevancy.
- Norway has requested that a single panel be established under Article 9.1 to examine various matters on the agenda of today's meeting. The United States does not agree.
- For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel.
- This is a decision taken by the DSB by consensus.
- Because the challenged actions were taken on the basis of U.S. national security interests, we continue to see no basis for this dispute. Therefore, we do not agree to establish a single panel under Article 9.1.

11. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE RUSSIAN FEDERATION (WT/DS554/17)

- Russia’s second panel request in this dispute regrettably shows its own disregard for WTO rules.
- As we explained in our statement last month addressing Russia’s panel request, because the United States has invoked Article XXI of the GATT 1994, there is no basis for a panel to review Russia’s claims of WTO-inconsistency. Each sovereign has the power to decide, for itself, what actions are essential to its security, as is reflected in the text of GATT 1994 Article XXI.¹¹
- As there is no finding a panel could make other than to note that the United States has invoked Article XXI, we do not see any point to this request.
- The position of the United States on Article XXI goes back more than 70 years, and remains the same in 2018 as it was in 1982,¹² 1949,¹³ and indeed during the negotiation of the GATT itself.¹⁴
- As noted previously, in 1982, when certain European actions were before the GATT Council, the European Economic Community and its member States stated that Article XXI was a reflection of a Member’s “inherent rights.” They stressed that “the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights.”¹⁵ In that same meeting, the United States,

¹¹ GATT 1994 Article XXI(b) (“Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* . . . (italics added).

¹² GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 8.

¹³ Contracting Parties, Summary Record of the Twenty-Second Meeting Held on 8 June 1949, GATT/CP.3/SR.22, p. 3.

¹⁴ See U.S. Answers Questions from the Panel and the Russian Federation, *Russia – Measures Concerning Traffic in Transit* (WT/DS512), paras. 1-15 (explaining negotiating history, including statements by U.S. delegate; available at <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.%28public%29.pdf>).

¹⁵ GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10.

Singapore, New Zealand, Canada, Norway, the United Kingdom, and Australia supported the European view.¹⁶

- In requesting this panel, however, Russia does not even act consistently with the view it expressed in 2017, *less than one year ago*. In another dispute, Russia expressed its understanding of Article XXI that a determination that an action is necessary for the protection of a Member's essential security interests, and a determination of what are those essential security interests, is at the sole discretion of that Member. The United States agreed with Russia's perspective on Article XXI.¹⁷
- The text of Article XXI has not changed in the past year – only Russia's interests have. That is not a sound basis for understanding WTO rules, and Russia's wholly contradictory legal positions do not contribute to the legitimacy of the WTO's dispute settlement system.
- If Russia maintains its misguided request for a panel to make findings that the United States has not acted consistently with WTO rules in this dispute, there is no finding a panel could make other than to note that the United States has invoked Article XXI.
- Russia has requested that a single panel be established under Article 9.1 to examine various matters on the agenda of today's meeting. The United States does not agree.
- For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel.
- This is a decision taken by the DSB by consensus.
- Because the challenged actions were taken on the basis of U.S. national security interests, we continue to see no basis for this dispute. Therefore, we do not agree to establish a single panel under Article 9.1.

Second Intervention

- As stated, we see no basis for this dispute as there are no findings a panel can make on Russia's claims. Therefore, as there is nothing to examine, Article 9.3 does not apply.

¹⁶ GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 7-11.

¹⁷ See, e.g., U.S. Third-Party Submission Regarding GATT Article XXI (Nov. 7, 2017) (available at <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-dispute-35>).

- In response to Russia's reference to Article 9.3, that provision does not contain any reference to DSB action, and therefore does not authorize the DSB to make a decision on the matter of choosing panelists or on the harmonization of timetables.
- Therefore, the DSB need not and cannot consider this issue at all.

12. CANADA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS557/2)

- As discussed during the last DSB meeting, and as noted today, the actions the United States has taken on imports of steel and aluminum pursuant to Section 232 are to address a threat to its national security.
- Every sovereign has the right to take action it considers necessary for the protection of its essential security. This inherent right was not forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right was enshrined in Article XXI of the GATT 1994. The actions of the United States are taken pursuant to and justified by this article.
- What remains inconsistent with the WTO Agreement, however, is the unilateral retaliation against the United States by various WTO Members, including Canada. These Members pretend that the U.S. actions under Section 232 are so-called “safeguards,” and claim that their unilateral, retaliatory duties constitute suspension of substantially equivalent concessions under the *WTO Agreement on Safeguards*.
- The United States cannot abide this level of hypocrisy. Just as these Members appear to be ready to undermine the dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too are they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregard them.
- This is all too apparent, not only to the United States, but to the Members themselves. Canada does not seriously believe that the U.S. actions under Section 232 are safeguard measures. If it did, Canada would have notified the Council for Trade in Goods of its suspension of concessions and other obligations, as would be required under the Safeguards Agreement if its retaliatory duties were in response to a U.S. safeguard action.
- Of course, Canada has not followed the WTO rules for safeguards because it does not actually believe the U.S. measures are safeguards.
- There is no doubt that Article XIX of the GATT 1994 may be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, is not invoking Article XIX as a basis for its Section 232 actions and has not even utilized its domestic law on safeguards.

Thus, Article XIX and the Safeguards Agreement are not relevant to the U.S. actions under Section 232.

- Because the United States is not invoking Article XIX, there is no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that are simply inapplicable.
- The additional, retaliatory duties are nothing other than duties in excess of Canada's WTO commitments and are applied only to the United States, contrary to Canada's most-favored-nation obligation. The United States will not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way.
- For these reasons, the United States requests that the DSB establish a panel to examine this matter with standard terms of reference.

13. CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS558/2)

- As discussed during the last DSB meeting, and as noted today, the actions the United States has taken on imports of steel and aluminum pursuant to Section 232 are to address a threat to its national security.
- Every sovereign has the right to take action it considers necessary for the protection of its essential security. This inherent right was not forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right was enshrined in Article XXI of the GATT 1994. The actions of the United States are completely justified under this article.
- What remains inconsistent with the WTO Agreement, however, is the unilateral retaliation against the United States by various WTO Members including China. These Members pretend that the U.S. actions under Section 232 are so-called “safeguards,” and claim that their unilateral, retaliatory duties constitute suspension of substantially equivalent concessions under the *WTO Agreement on Safeguards*.
- The United States cannot abide this level of hypocrisy. Just as these Members appear to be ready to undermine the dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too are they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregard them.
- This is all too apparent, not only to the United States, but to the Members themselves. Clearly, China does not seriously believe that the U.S. actions under Section 232 are safeguard measures since it failed to comply with the most basic elements of the Safeguards Agreement that would be necessary to take the action it did. Suspension of concessions and other obligations under the Safeguards Agreement require a multi-step process that must take place within 90 days from the application of a safeguard measure. That process entails certain procedures and considerations that China has not satisfied.
- If China truly considered the U.S. actions under Section 232 to be safeguards, it would certainly have respected an obligation to allow 30 days for consultations and to wait 30 days to implement its suspension of concessions. But China did not comply with either of these obligations.

- Moreover, China has not even attempted to address whether its retaliation is in response to an alleged “safeguard” taken as a result of an absolute increase in imports. If there were an absolute increase in imports, the right to suspend substantially equivalent concessions under the Safeguard Agreement may not be exercised for the first three years of the safeguard measure.
- China’s blatant disregard for these provisions of the Safeguards Agreement proves that China is not serious about its contention that the U.S. actions under Section 232 are safeguard measures or that China is exercising a right under the Safeguards Agreement.
- There is no doubt that Article XIX of the GATT 1994 may be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, is not invoking Article XIX as a basis for its Section 232 actions and has not even utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement are not relevant to the U.S. actions under Section 232.
- Because the United States is not invoking Article XIX, there is no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that are simply inapplicable.
- The additional, retaliatory duties are nothing other than duties in excess of China’s WTO commitments and are applied only to the United States, contrary to China’s most-favored-nation obligation. The United States will not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way.
- For these reasons, the United States requests that the DSB establish a panel to examine this matter with standard terms of reference.

14. EUROPEAN UNION – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS559/2)

- As discussed during the last DSB meeting, and as noted today, the actions the United States has taken on imports of steel and aluminum pursuant to Section 232 are to address a threat to its national security.
- Every sovereign has the right to take action it considers necessary for the protection of its essential security. This inherent right was not forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right was enshrined in Article XXI of the GATT 1994. The actions of the United States are completely justified under this article.
- What remains inconsistent with the WTO Agreement, however, is the unilateral retaliation against the United States by various WTO Members including the European Union. These Members pretend that the U.S. actions under Section 232 are so-called “safeguards,” and claim that their unilateral, retaliatory duties constitute suspension of substantially equivalent concessions under the *WTO Agreement on Safeguards*.
- The United States cannot abide this level of hypocrisy. Just as these Members appear to be ready to undermine the dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too are they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregard them.
- The European Union’s willingness to disregard WTO rules is apparent in its characterization of the U.S. actions under Section 232 as safeguard measures. This fiction requires the European Union to ignore the facts that contradict its narrative.
- As noted, the U.S. actions on steel and aluminum were taken under Section 232, a national security statute that expressly relates to imports that threaten to impair the national security of the United States. The President of the United States made his determinations on the basis of lengthy and detailed reports by the government department responsible for this national security purpose. The U.S. actions were not taken pursuant to Section 201 of the Trade Act of 1974 that authorizes the imposition of a safeguard measure under U.S. domestic law.
- There is no doubt that Article XIX of the GATT 1994 may be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect

to increased imports. The United States, however, is not invoking Article XIX as a basis for its Section 232 actions and has not utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement are not relevant to the U.S. actions under Section 232.

- Because the United States is not invoking Article XIX, there is no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that are simply inapplicable.
- The additional, retaliatory duties are nothing other than duties in excess of the European Union's WTO commitments and are applied only to the United States, contrary to the European Union's most-favored-nation obligation. The United States will not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way.
- For these reasons, the United States requests that the DSB establish a panel to examine this matter with standard terms of reference.

15. MEXICO – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS560/2)

- As discussed during the last DSB meeting, and as noted today, the actions the United States has taken on imports of steel and aluminum pursuant to Section 232 are to address a threat to its national security.
- Every sovereign has the right to take action it considers necessary for the protection of its essential security. This inherent right was not forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right was enshrined in Article XXI of the GATT 1994. The actions of the United States are completely justified under this article.
- What remains inconsistent with the WTO Agreement, however, is the unilateral retaliation against the United States by various WTO Members including Mexico. These Members pretend that the U.S. actions under Section 232 are so-called “safeguards,” and claim that their unilateral, retaliatory duties constitute suspension of substantially equivalent concessions under the *WTO Agreement on Safeguards*.
- The United States cannot abide this level of hypocrisy. Just as these Members appear to be ready to undermine the dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too are they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregard them.
- This is all too apparent, not only to the United States, but to the Members themselves. Clearly, Mexico does not seriously believe that the U.S. actions under Section 232 are safeguard measures since it has not even notified the Council for Trade in Goods of its suspension of concessions and other obligations, as would be required under the Safeguards Agreement if its retaliatory duties were in response to a U.S. safeguard action.
- Of course, Mexico has not followed the WTO rules that would apply in the safeguards context because it does not in reality consider the U.S. measures to be safeguards.
- There is no doubt that Article XIX of the GATT 1994 may be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, is not invoking Article XIX as a basis for its Section 232 actions and has not utilized its domestic law on safeguards. Thus,

Article XIX and the Safeguards Agreement are not relevant to the U.S. actions under Section 232.

- Because the United States is not invoking Article XIX, there is no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that are simply inapplicable.
- The increased, retaliatory duties are nothing other than duties applied only to the United States, contrary to Mexico's most-favored-nation obligation. The United States will not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way.
- For these reasons, the United States requests that the DSB establish a panel to examine this matter with standard terms of reference.

16. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY TURKEY
(WT/DS564/15)

- We regret that Turkey has moved forward with this second request for the establishment of a panel.
- As we explained in our statement last month addressing Turkey’s panel request, because the United States has invoked Article XXI of the GATT 1994, there is no basis for a panel to review Turkey’s claims of WTO-inconsistency. There is no finding a panel could make other than to note that the United States has invoked Article XXI.
- If the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO’s dispute settlement system and even the viability of the WTO as a whole.
- Infringing on a sovereign’s right to determine, for itself, what is in its own essential security interests would run exactly contrary to the WTO reforms that are necessary in order for this organization to maintain any relevancy.
- Turkey has requested that a single panel be established under Article 9.1 to examine various matters on the agenda of today’s meeting. The United States does not agree.
- For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel.
- This is a decision taken by the DSB by consensus.
- Because the challenged actions were taken on the basis of U.S. national security interests, we continue to see no basis for this dispute. Therefore, we do not agree to establish a single panel under Article 9.1.

17. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDIA (WT/DS547/8)

- The United States is disappointed that India has submitted a panel request in this dispute. This action is misdirected. It does not address the damage to the international trading system posed by the creation and maintenance of non-market economic conditions in the steel and aluminum sectors.
- In fact, rather than support the international trading system by taking action to resolve the underlying concerns, India is undermining the trading system by asking the WTO to do what it was never intended to do. It is simply not the WTO's role, nor its competence, to review a sovereign nation's judgment of its essential security interests.
- The United States has explained that it considers the Section 232 measures necessary for the protection of its essential security interests, and they are therefore justified under Article XXI of the GATT 1994. In particular, we have explained that the President of the United States has determined that these measures are necessary to address the threatened impairment that imports of steel and aluminum articles pose to U.S. national security.
- In the U.S. reply to the consultation requests challenging the 232 measures, the United States clearly stated: "Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement."¹⁸ We therefore do not understand the purpose of this request for panel establishment, seeking WTO findings that the United States has breached certain WTO provisions. The WTO cannot, consistent with Article XXI, consider those claims or make the requested findings.
- The clear and unequivocal U.S. position, for over 70 years, is that issues of national security are not matters appropriate for adjudication in the WTO dispute settlement system.
- No WTO Member can be surprised by this view. For decades, the United States, as well as other WTO Members, has consistently held the position that actions taken pursuant to Article XXI are not subject to review in GATT or WTO dispute settlement. Each

¹⁸ See e.g., WT/DS548/13.

sovereign has the power to decide, for itself, what actions are essential to its security, as is reflected in the text of GATT 1994 Article XXI.¹⁹

- For example, in 1982, when certain European actions were before the GATT Council, the European Economic Community and its member States stated that Article XXI was a reflection of a Member’s “inherent rights.” They stressed that “the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights.”²⁰
- The United States in the same meeting supported the European position, stating that the “GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis.”²¹ The position of the United States remains the same in 2018 as it was in 1982, 1949, and indeed during the negotiation of the GATT itself.
- Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised by India. Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States. We therefore do not see any reason for this matter to proceed further.
- The United States wishes to be clear: if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO’s dispute settlement system and even the viability of the WTO as a whole.
- Infringing on a sovereign’s right to determine, for itself, what is in its own essential security interests would run exactly contrary to the WTO reforms that are necessary in order for this organization to maintain any relevancy.
- For these reasons, the United States will not agree to establishment of the panel requested by India today.

¹⁹ GATT 1994 Article XXI(b) (“Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* . . . (italics added)).

²⁰ C/M/157, p. 10.

²¹ *Id.*

18. UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY SWITZERLAND (WT/DS556/15)

- The United States is disappointed that Switzerland has submitted a panel request in this dispute. This action is misdirected. It does not address the damage to the international trading system posed by the creation and maintenance of non-market economic conditions in the steel and aluminum sectors.
- In fact, rather than support the international trading system by taking action to resolve the underlying concerns, Switzerland is undermining the trading system by asking the WTO to do what it was never intended to do. It is simply not the WTO's role, nor its competence, to review a sovereign nation's judgment of its essential security interests.
- The United States has explained that it considers the Section 232 measures necessary for the protection of its essential security interests, and they are therefore justified under Article XXI of the GATT 1994. In particular, we have explained that the U.S. President has determined that these measures are necessary to address the threatened impairment that imports of steel and aluminum articles pose to U.S. national security.
- In the U.S. reply to the consultation requests challenging the 232 measures, the United States clearly stated: "Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement."²² We therefore do not understand the purpose of this request for panel establishment, seeking WTO findings that the United States has breached certain WTO provisions. The WTO cannot, consistent with Article XXI, consider those claims or make the requested findings.
- The clear and unequivocal U.S. position, for over 70 years, is that issues of national security are not matters appropriate for adjudication in the WTO dispute settlement system.
- No WTO Member can be surprised by this view. For decades, the United States, as well as other WTO Members, has consistently held the position that actions taken pursuant to Article XXI are not subject to review in GATT or WTO dispute settlement. Each sovereign has the power to decide, for itself, what actions are essential to its security, as

²² See e.g., WT/DS548/13.

is reflected in the text of GATT 1994 Article XXI.²³

- As noted previously, in 1982, when certain European actions were before the GATT Council, the European Economic Community and its member States stated that Article XXI was a reflection of a Member's "inherent rights." They stressed that "the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights."²⁴
- That European statement was correct in 1982, and the United States in the same meeting supported the European position.²⁵ So, too, did New Zealand, Singapore, Norway, Canada, the United Kingdom, and Australia.²⁶ The position of the United States remains the same in 2018 as it was in 1982, 1949, and indeed during the negotiation of the GATT itself.
- Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised by Switzerland. Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States. We therefore do not see any reason for this matter to proceed further.
- The United States wishes to be clear: if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole.
- Infringing on a sovereign's right to determine, for itself, what is in its own essential security interests would run exactly contrary to the WTO reforms that are necessary in order for this organization to maintain any relevancy.
- For these reasons, the United States will not agree to establishment of the panel requested by Switzerland today.

²³ GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* . . . (italics added)).

²⁴ C/M/157, p. 10.

²⁵ *Id.* (U.S. stated that the "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis").

²⁶ GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 7-11.

23. APPELLATE BODY APPOINTMENTS: PROPOSAL BY VARIOUS MEMBERS
(WT/DSB/W/609/REV.6)

- The United States thanks the Chair for the continued work on these issues.
- As we have explained in prior meetings, we are not in a position to support the proposed decision.
- The systemic concerns that we have identified remain unaddressed.
- As the United States has explained at recent DSB meetings, for more than 15 years and across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members.
- Through persistent overreaching, the WTO Appellate Body has been adding obligations that were never agreed by the United States and other WTO Members.
- The 2018 U.S. Trade Policy Agenda outlined several longstanding U.S. concerns.²⁷
 - The United States has raised repeated concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.
 - And as we explained in recent meetings of the DSB, the Appellate Body has issued advisory opinions on issues not necessary to resolve a dispute and reviewed panel fact-finding despite appeals being limited to legal issues. Furthermore, the Appellate Body has asserted that panels must follow its reports although Members have not agreed to a system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules.
- And for more than a year, the United States has been calling for WTO Members to correct the situation where the Appellate Body acts as if it has the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office – as set by the WTO Members – has expired. This so-called “Rule 15” is, on its face, another example of the Appellate Body's disregard for the WTO's rules.

²⁷ Office of the U.S. Trade Representative, 2018 President's Trade Policy Agenda, at 22-28.

- Our concerns have not been addressed. When the Appellate Body abuses the authority it was given within the dispute settlement system, it undermines the legitimacy of the system and damages the interests of all WTO Members who care about having the agreements respected as they were negotiated and agreed.
- The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system, and will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.

24. RIGHT OF A MEMBER TO DECIDE THE COMPOSITION OF ITS DELEGATION FOR CONSULTATIONS: STATEMENT BY CHINA

- The United States takes note of China’s statement.
- We understand China to assert a so-called “right” for one Member to decide unilaterally to include persons other than government officials in meetings between parties consulting pursuant to Article 4 of the DSU.
- Consultations play an important role in helping to resolve a dispute.
- Article 4.2 of the DSU provides that “[e]ach Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.”²⁸
- And Article 4.5 of the DSU provides that “[i]n the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.”
- Thus, consultations are not simply a box-checking exercise.
- Rather, they “serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to ‘define and delimit’ the scope of the dispute between them.”²⁹
- The DSU text does not specify the right asserted by China to insist that a non-governmental person be permitted to attend consultations between two WTO Members.
- The “right” asserted by China would therefore encompass the ability to force another Member to make statements in the presence of that person.
- In addition to not seeing such a right expressed in the DSU, we do not see how insisting on the ability to bring non-governmental persons to consultations, over the objections of the other consulting Members, would serve the aim of consultations.
- For instance, if a party to consultations were to indicate they did not think it was helpful or appropriate to include persons other than government officials, insisting on the presence of such non-government persons would not assist in reaching a positive solution

²⁸ DSU Art. 4.2.

²⁹ *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293.

to that dispute.

- Moreover, what China attempts to frame as a Member’s “right” is essentially a view that its preference concerning the participation of non-governmental persons in consultations meetings must dominate over the preferences of the other consulting Member.
- This hardly seems to reflect the cooperative spirit in which consultations should be held. We would consider this an issue – not unlike venue or timing – that the consulting parties in a given dispute should discuss and work out among themselves.
- We also note that China has framed the issue as concerning the inclusion of outside counsel, or lawyers. However, an implication of China’s position would be that Members would also be free to include, as part of their own government delegation, other members of the private sector, including non-governmental organizations – despite the preference of the other consulting Member.
- Can China confirm this understanding is correct? And, if not, on what basis in the text of the DSU would China distinguish between one category of non-governmental persons – lawyers – and other categories of non-governmental persons?
- We also take note of China’s suggestion that the Appellate Body has somehow already decided this issue.
- Putting aside the question of what weight should be accorded to the Appellate Body’s statement in *Bananas*³⁰, which was made in the context of that particular dispute, we would note that it is simply inapplicable to the issue China has raised.
- In particular, in *Bananas*, the Appellate Body allowed the participation of two legal counsel, who were not government employees of a party, at the oral hearing in that appeal.³¹
- The issue, therefore, did not concern consultations between two Members under DSU Article 4.
- Finally, we note with concern that China has made several representations about certain consultations held with the United States.
- We would remind China of its obligations, including in Article 4.6 of the DSU, which provides that “[c]onsultations shall be confidential.”

³⁰ WT/DS27.

³¹ WT/DS27/AB/R, paras. 10-12.

- In its statement today, China indicated it understood that obligation, but then proceeded to ignore that obligation by making several representations with respect to consultations with the United States. Given this requirement of confidentiality, it would not be appropriate for the United States to engage on China's specific assertions concerning consultations with the United States.
- We would note, however, that it would undermine the purposes served by consultations if a Member cannot expect the other party to honor WTO rules to maintain the confidentiality of those consultations.
- At best, China's representations concerning consultations with the United States at this meeting represent a lapse in judgment by China. We expect that it will not be repeated.